Union Switch & Signal, Inc. ***and*** **Society of Engineers.** Case 6–CA–25494

March 31, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On April 7, 1994, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Union Switch & Signal, Inc., Columbia, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In agreeing with the judge that the Respondent repudiated its contractual obligation to arbitrate grievances in violation of Sec. 8(a)(5) and (1), we find this case distinguishable from *Dallas Morning News*, 285 NLRB 807 (1987), on which the Respondent relies in its brief. In *Dallas Morning News*, the Board found that the employer's refusal to process certain postexpiration grievances did not constitute a repudiation, where the employer's statements that the union's letter seeking arbitration had ''no basis'' and was ''of no force and effect'' were ambiguous and may have been based on the content of the grievances as well as the expiration of the contract. In the present case, in contrast, the Respondent specifically relied on its assertion that the Union was ''no longer a labor union representing Jacqueline Walsh or any other Company employee'' as the basis for refusing to submit Walsh's grievance to arbitration.

In agreeing with the judge that the Respondent violated Sec. 8(a)(5) and (1) by refusing to arbitrate the Walsh grievance and by refusing to provide the information requested by the Union on April 20 and 27, 1993, based on the decertification of the Union, we find it unnecessary to rely on *Government Employees Local 888 (Bayley-Seton)*, 308 NLRB 646 (1992), and rely instead on *Missouri Portland Cement Co.*, 291 NLRB 1043 (1988).

David L. Shepley, Esq., for the General Counsel.
Robert F. Prorok, Esq., of Pittsburgh, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Pittsburgh, Pennsylvania, on November 10, 1993, pursuant to a charge filed by the Society of Engineers (the SOE) on April 30, 1993, and served on May 3, 1993, and a complaint issued on June 21, 1993, and amended on November 10, 1993. The complaint as amended alleges that Respondent Union Switch & Signal, Inc. violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing since about November 2, 1992, to furnish the SOE with a copy of an indoor air quality study which is necessary for, and relevant to, the SOE's performance of its duties as the exclusive collective-bargaining representative of some of Respondent's employees. The complaint as amended further alleges that Respondent violated Section 8(a)(5) and (1) by refusing about April 27, 1993, to process a grievance, on the ground that the SOE was no longer the exclusive collective-bargaining representative of the unit. Also, the complaint as amended alleges that Respondent violated Section 8(a)(5) and (1) since about April 27, 1993, by failing and refusing to furnish the Union with the air quality study and with documentation which evaluated certain working condition accommodations, all of which information is necessary for, and relevant to, the SOE's performance of its duties as exclusive bargaining representative.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel) and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with its principal office and place of business in Columbia, South Carolina, and a facility located in Pittsburgh, Pennsylvania. Respondent is engaged in the manufacture and nonretail sale of railway and transit signaling products and systems. During the 12-month period ending on March 31, 1993, Respondent sold and shipped from its Pittsburgh, Pennsylvania facility goods valued in excess of $50,000 directly to points outside Pennsylvania. I find that, as Respondent admits, Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

For many years until April 6, 1993, the SOE has been the designated exclusive bargaining representative of an admittedly appropriate unit described in Conclusions of Law 3, and has been recognized as such representative. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from May 1, 1991, to April 30, 1993. The recognition clause of this agreement indicates that the SOE has received two certifications from the Board; the recited case number of one of these certifications (6–R–1751) indicates that it preceded the effective date of the 1947 amendments to the Act.

B. *Provisions of the 1991–1993 Bargaining Agreement*

The 1991–1993 bargaining agreement included the following provisions:

ARTICLE II

MANAGEMENT RIGHTS

Management of the plant and direction of the working forces are vested in the Company. The exercise of such rights by the Company shall include but not be limited to the right to hire, assign and schedule the work, promote, transfer, make temporary layoffs, drop for lack of business, and to suspend, demote, discharge, or otherwise discipline employees for proper cause provided that no action so taken shall be in violation of any provision of this agreement.

. . . .

ARTICLE VIII

SENIORITY

A. *SENIORITY*. Seniority is defined as the length of continuous service with the Company which shall be calculated from date of first employment or re-employment following a break in continuous service as provided in Section B of this Article. Effective January 1, 1992 in the case of re-employment, service accumulated prior to such break will be included in determining length of continuous service.

B. *BREAK IN SENIORITY*. Seniority of an employee shall be broken in the manner set forth below:

1. Resignation or other voluntary termination of employment.
2. Upon discharge.
3. Absence for three (3) consecutive working days without notifying the appropriate supervisor of the reason for absence (unless the giving of such notice is impractical).
4. Termination pursuant to Article XIII entitled ''Severance Allowance.''

C. *APPLICATION OF SENIORITY*. Seniority shall only be applied to determine an employee's rights with respect to vacation, severance pay, and disability absence as provided for in other Articles of this Agreement.

ARTICLE IX

GRIEVANCE/ARBITRATION PROCEDURE

A. *DEFINITION OF GRIEVANCE*. A grievance is defined to be any dispute between the Company and one or more employees or the [SOE] as to an alleged violation of the terms of this Agreement, or any matter involving wages, hours or working conditions not specifically covered by this agreement. A grievance is not valid unless taken up in the lst Step within ten (10) working days after the grievable event. [SOE] officers may skip steps 1 and 2 and submit grievances directly to step 3 of the grievance procedure. Such grievance is not valid unless taken up within ten (10) working days after the grievable event.

B. *PROCEDURE*. The following is the procedure for adjusting grievances:

. . . .

STEP 3: If no satisfactory adjustment of the grievance is made in the 2nd Step, the [SOE] Grievance Committee must take the grievance up with the appropriate Vice President and the Vice President, Human Resources, or their designated representatives within fourteen (14) working days after receipt of the Manager's reply. . . . A grievance pertaining to a suspension or discharge may be taken up directly in step 3 by the Grievance Committee the same day it occurs.

STEP 4: If a grievance involving an alleged violation of a provision of this Agreement is not satisfactorily adjusted under the procedure set forth above, only the [SOE] may make written request for arbitration. This request must be made within ten (10) working days after final answer under the 3rd Step. Such grievance shall be submitted for final decision to an Arbitrator to be selected as follows:

ARBITRATION PROCEDURE: An impartial arbitrator shall be appointed by mutual agreement of the parties hereto within thirty (30) days of the date of the appeal. In case of failure to agree within said thirty (30) days, the parties shall request the Federal Mediation and Conciliation Service to submit a list of five (5) recognized arbitrators to the parties, who shall select one by each alternately striking off one name from the list. The last name remaining on the said list shall be the arbitrator. An arbitrator to whom any grievance shall be submitted in accordance with the provisions of this Section shall have jurisdiction and authorization to interpret and apply the provisions of this Agreement insofar as shall be necessary to the determination of such grievance, but he shall not have jurisdiction or authority to make any decision which, in any way, alters, adds to, subtracts from, or is in conflict with any provision of this Agreement. The decision of the arbitrator shall be final and binding. The expenses and fee incident to the services of the arbitrator shall be shared equally by the Company and the [SOE].

. . . .

D. *GRIEVANCE BUSINESS*. [An SOE] representative will be permitted to conduct [SOE] grievance business upon request unless his absence would cause unwarranted interference with Company operations. When a representative of the [SOE] deems it necessary to leave his section or enter another section during working hours on a grievance matter, he will be permitted to do so unless such action would cause unwarranted interference with Company operations. In such cases, the appropriate supervisor will make arrangements for the [SOE] representative to conduct the grievance business as promptly as possible.

E. *LOST TIME*:

1. It is agreed that grievance processing time will be kept to a minimum commensurate with good practice and in the interest of efficiency. In order to keep lost time at a minimum, the [SOE] Grievance Committee shall be comprised of not more than three (3) [SOE] eligible members.

2. No deductions will be made by the Company from representative's compensation for such time spent in:
a) Handling and adjustment of grievances.
b) Attendance at meeting with Management within the employee's basic work week.
3. The [SOE] will reimburse the Company for all such time lost in accordance with the representative's hourly rate except the [SOE] will reimburse the Company for one-half such time lost in meetings at Step 2 and Step 3 of the Grievance Procedure.

ARTICLE X

DISCHARGE OR SUSPENSION

The Company shall not discharge or suspend any employee without proper cause.

. . . .

ARTICLE XII

ACCESS TO RECORDS

The Company shall furnish the [SOE] upon request any available information or records which are relevant and necessary for the purposes of the grievance procedure. . . .

ARTICLE XIII

SEVERANCE ALLOWANCE

An employee whose employment is terminated by the Company for reorganization or lack of business reasons only shall be given the following severance allowance:. . .

. . . with payment of such allowance the employee shall lose all seniority and re-employment rights for all purposes.

. . . .

ARTICLE XV

. . . .

J. The Company will develop by January 1, 1992 a smoking policy for application to the North Hills Facility. This policy will restrict smoking to certain independently ventilated areas.

. . . .

ARTICLE XVI

NATURE OF AGREEMENT

This Agreement shall constitute the full and complete agreement between the parties and there are no further matters for negotiation; however, the parties may by mutual agreement during the life of this Agreement enter into supplemental agreements.

In addition, the bargaining agreement contains a provision (art. I,B, ''Society Security'') requiring unit members to become or remain SOE members as a condition of employment, but ''The payment of dues to the [SOE] is not a condition of employment.'' The agreement also contains a provision (art. I,C) requiring Respondent to honor checkoff authorizations for SOE dues.

C. *The SOE's 1991 Efforts to Conduct an Air Quality Evaluation*

Many of the employees in the unit covered by Respondent's contract with the SOE work in a Pittsburgh building, located at 5800 Corporate Drive, which is rented by Respondent and whose windows are sealed. In the late summer or early fall of 1991, the SOE retained two environmental consultants for the purpose of conducting a study of the air quality in this building. Unit employees Jacqueline Walsh or Thomas C. Clapper took them to the front door of the building, where they signed in through the guard's desk. Neither of these environmental consultants ever prepared a report. One of them was unable to prepare a report, because Respondent refused to allow him to look at the ventilation system. The SOE expected the other consultant to prepare a report, but he never submitted one.

D. *Walsh's Separation in October 1992*

At all relevant times before October 19, 1992, Walsh was a member of the bargaining unit covered by the 1991–1993 contract. Her regular duty station was at the 5800 Corporate Drive address. A letter to her dated October 19, 1992, from Raymond F. Stetz, who is Respondent's director of human resources, began as follows:

> This letter responds to your correspondence and that of your physician(s) concerning alleged health problems and your request to work at home or another job site as an accommodation to these alleged health problems.
>
> The medical information you and/or your physician(s) submitted reveals that your condition is attributable to ''typical inhalants'' in the workplace and that ''Ms. Walsh cannot and should not return to her current work place.''
>
> First, it is clear that your alleged health problems are unrelated to your place of employment located at 5800 Corporate Drive, Pittsburgh, Pennsylvania. An air quality study of the Union Switch & Signal Corporate Drive offices discloses that the air quality of these offices is within acceptable limits.

The letter went on to state that Walsh had requested certain ''accommodations'' which were ''not reasonable under the circumstances.'' The letter stated that transferring her to another work site was not ''feasible'' because all of Respondent's engineers performing her type of work were located in the Corporate Drive facility and, in any event, ''transfer would not be effective because your alleged health problems are caused by 'typical inhalants' in the workplace.'' The letter further stated that for various specified reasons, ''it would be an undue hardship to [Respondent] for you to work at home.''

This letter concluded with the following language:

> Therefore, Union Switch has no choice but to treat your alleged inability to work at the Corporate Drive offices as a separation from employment effective October 19, 1992.

> A separate letter will be sent to you detailing applicable benefit options and any accrued monies which might be due and owing.[1]

E. *The SOE's Initial 1992 Request for the Air Quality Study*

The air quality study referred to in Stetz' October 19, 1992 letter to Walsh had been prepared by Volz Environmental Services (Volz) at the behest of Respondent's landlord. On October 20, 1992, Stetz posted the following notice on about 10 bulletin boards:

> The Indoor Air Quality Study of our building, as announced and conducted last month, has been completed with very good results (see the attached letter from Volz . . .). A detailed report of the Study may be reviewed in my office.

The letter from Volz thus referred to, addressed to the ''Property Manager/Leasing/AREEA Investment Managers, Inc.,'' states in part as follows:

> Enclosed please find the Indoor Air Quality Study performed at the business office of Union Switch & Signal Inc., 5800 Corporate Drive. The report details the survey findings, including the results of the Carbon Monoxide (CO), Carbon Dioxide (CO_2), Nitric Oxide (NO), Nitric Dioxide (NO_2), Formaldehyde (HCHO), Radon and temperature and relative humidity monitoring. All air quality parameters with respect to possible contaminants measured were within acceptable limits.

The study itself was never posted.

At all relevant times, the president of the SOE has been unit employee Clapper. By hand-delivered letter to Stetz dated October 23, 1992, under the SOE's printed letterhead, Clapper stated, in part:

> [SOE] officials wish to thoroughly review the [air quality] report . . . I would expect the report for a thorough detailed study to be rather lengthy, and could take several hours to review it [sic] the depth [SOE] officers wish to review it. I do not believe you would consider it practical for [SOE] officer(s) to sit in your office for extended hours to review the report.
>
> The [SOE] believes the content of the report may be an important factor in the continued employment benefit entitlements of Ms. Jacqueline Walsh. The [SOE] also considers air quality concerns to be a working condition to which employees represented by the [SOE] are subjected.
>
> In order to properly represent Ms. Walsh and the other [SOE] represented employees, the [SOE] requests a complete copy of the detailed report . . . by [the] end of the working day of October 28, 1992. Please advise me of any additional requirements, if any, which may be necessary to obtain a copy of the report within the same time frame. I believe the requested receipt date is reasonable since you currently have a copy in your office.

Clapper never received a response to this letter.

F. *Later 1992 Requests by the SOE for the Air Quality Study; the Grievance Filed on Behalf of Employee Walsh on October 29, 1992*

By hand-delivered letter to Stetz dated October 29, 1992, under the SOE's printed letterhead, Clapper acknowledged receipt of a copy of Stetz' October 19 letter to Walsh and stated that the SOE contended that the separation referred to therein ''is the equivalent of a discharge.'' The letter went on to state, in part:

> Your letter listed reasons why the Company considered Ms. Walsh's requested accommodations to be unreasonable, but failed to explain the term ''separation of employment.'' I have reviewed the section of the Company Policy Manual titled ''Separation from Employment''. . . I found the phrase ''inability to perform work'' listed under the method of ''disciplinary discharge.'' I found no other referrals to ''inability to perform work.'' The policy indicates that the Company also considers the separation of Ms. Walsh to be the equivalent of a discharge.
>
> The [SOE] further contends that [the Company] has discharged Ms. Walsh without proper cause, and therefore, is in violation of Article X of the current labor agreement [see supra, section II,B] . . . . On behalf of Ms. Walsh, the [SOE] hereby files a grievance at step 3 of [the] grievance procedure per Article IX of the current labor agreement [see supra, Section II,B].
>
> By letter dated 10/23/92, the [SOE] requested a complete copy of the report of the recent environmental study by the end of the working day of 10/28/92. It has not been received. The [SOE] needs the report to properly represent Ms. Walsh. The [SOE] considers this report to be necessary and relevant information to the grievance process. Also, the Company has a contractual obligation to provide the requested report [specifying art. XII, supra, part II,B]. Please provide a copy of the report by the end of the working day of 11/4/92. A grievance meeting can be scheduled after receipt of the information.

Respondent did not provide the requested information.

By letter under the SOE's printed letterhead, hand-delivered to Stetz on November 2,[2] Clapper stated that the SOE had decided to cancel the Christmas party, and asked Stetz to stamp ''approved for posting'' an attached notice about the cancellation. The letter went on to say:

> I also want to remind you of the request I made for a complete copy of the recent environmental study of the building as outlined in the letter of grievance dated 10/29/92. I had also requested this information earlier by letter to you dated 10/23/92. Per that letter I had requested receipt by the end of the working day of 10/28/92. I did not receive it. Per the grievance letter of 10/29/92, I have requested receipt by the end of the working day of Wednesday, 11/4/92.

[1] No such letter is included in the record before me.

[2] Owing to a typographical error, the letter is dated 1993 rather than 1992.

> If you decline to provide the requested information, then please provide the [SOE] with a written explanation as to the reasons why the Company is not complying with the request.

At the time Clapper sent this letter, the SOE's vice president was unit employee Dick J. Kolkman (also spelled Kolkmen in the record). On an undisclosed date a few days after Respondent received Clapper's November 2 letter, Kolkman advised Clapper that Stetz had told Kolkman that the Company was not going to provide this information.[3] During a conversation with Stetz the week after the November 2 letter, Clapper explained that he wanted the information for grievance proceedings, stated that he wanted to have the SOE's legal counsel and Walsh's physicians look it over and evaluate it, and asked why the Company was not going to provide the information. According to Clapper's undenied and credible testimony, Stetz said ''that he would not provide a copy of the information, that I could see it just like any other employee was going to be entitled to see it and that I had no need to have a copy of the study.''

Kolkman credibly testified that Respondent ''frowns'' on the conduct of ''union business'' during working hours. Clapper credibly testified that ''full knowing that I could not get a copy of the report,'' he arranged with Stetz for a November 16 inspection of the report; Stetz testified that Clapper said he wanted to come in at noon, when his 1/2-hour lunch period began, and that Clapper ''has always been . . . sensitive about company time. In my experience, he's always volunteered to do it on his lunch hour.'' Clapper inspected the report in Stetz' office and in his presence, while various persons who had business with Stetz came into and left the office. Clapper's lunchbreak is 30 minutes long. He reviewed the report for 30 to 45 minutes, and then left the office; according to Stetz' testimony, Clapper left at his own volition. Thereafter, Clapper asked if Kolkman could review the report; Stetz said that ''that would be fine.'' Pursuant to arrangements with management, Kolkman came to Stetz' office at around lunch time on November 19 and reviewed the report for 30 minutes, the length of his lunch period; Stetz testified that Kolkman, too, left at his own volition.[4] In Stetz' presence, each of these employees took notes of the report; Clapper's notes cover two handwritten pages and Kolkman's notes cover three. Stetz did not tell either employee that the amount of time which he could spend reviewing the report was subject to any restrictions consistent with Stetz' other scheduling obligations. Stetz credibly testified that he did not recall that Clapper or Kolkman told Stetz on either November 16 or 19 that reviewing the report was inadequate, and there is no evidence that either employee so told Stetz on these occasions. Stetz further testified that if Clapper or any other SOE representative had asked Stetz for an additional opportunity to review the report, Stetz would have permitted it.

Clapper credibly testified that the report (which is not in the record)[5] ''consisted of several pages of text which was sort of in summary form and that was followed by really about 12 pages of tabulated data from which the results were on like on three cover sheets along with the various tabulations.''[6] The contents of the employees' notes are described, infra, Section II,I,1,b. After both Clapper and Kolkman had taken these notes, they discussed the methods which had been used in the study. Kolkman expressed to Clapper the opinion that the way it had been conducted was flawed; that the measurements had not been taken near where Walsh's desk had been situated, but had been taken in ''an area close to the lobby in some cases where you have the fresh air coming in from doors opening; other areas in the building were less populated, maybe not quite as heavy . . . they were probably somewhat selectively made.''

On an undisclosed date, Clapper sent Walsh a copy of both his and Kolkman's notes. She discussed them with Clapper, but not with the two air quality consultants (whose identity she knew) whom the SOE had used for the aborted 1991 air quality studies. Nor did Clapper or Kolkman review their notes with either of these consultants.

G. *The February 1993 Third-Step Meeting on the Walsh Grievance*

As previously noted, the Walsh grievance was filed at the third step of the grievance procedure. On February 22, 1993, the parties met for a third-step meeting on that grievance. Present for the SOE were Walsh, SOE President Clapper, then SOE Vice President Roger Lyle, and SOE Attorney Thomas E. Weiers Jr. Present for Respondent were Stetz and Attorney Robert F. Prorok. The SOE representatives took the position that Walsh's separation constituted a breach of the provision of the bargaining agreement (art. X) which forbids discharge or suspension without proper cause (see supra, sec. II,B). The SOE suggested a number of what it claimed were reasonable accommodations to Walsh's respiratory problems which were believed to be caused by the Corporate Drive building, possibly its air quality. These suggestions included shifting her working hours to times of the day when smoke and other deficiencies in the air may have dissipated, having her travel more, having her work at home part of the time, and putting her in a better ventilated area or in a room where a small openable window could be installed in one of the existing sealed windows. Weiers stated that the SOE would be ''perfectly willing to look over the information that they would have available to try to arrive at those accommodations.'' Respondent's representatives told the SOE that they would look over these suggestions and respond within 14 days.

By letter to Weiers dated March 10, 1993, Prorok stated that the SOE's ''alternative proposals'' at the February 22 meeting ''all essentially involved more moderate accommodations to Ms. Walsh's alleged respiratory restrictions than were proposed prior to her separation from employment.'' The letter went on to say:

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[3] My finding as to the Kolkman-Clapper conversation is based on Clapper's testimony, which was not received to show what Stetz in fact told Kolkman. Stetz and Kolkman testified for Respondent, but were not asked about this conversation.

[4] My finding as to the hour of the day he came to Stetz' office is based on Kolkman's testimony. For demeanor reasons, I do not accept Stetz' testimony that Kolkman came in at about 10 a.m.

[5] See *Electrical Energy Services*, 288 NLRB 925, 931 (1988).

[6] Clapper's notes contain the following entry: ''8 page report plus/15 pages of attachments/3 attachments, each attachment had a cover page (15-3=12 pages of info.).''

> As you recognized at the February 22, 1993 meeting, Ms. Walsh's proposal to work at home full time was not feasible. Nonetheless, that was the restriction placed on Ms. Walsh's return to work by Dr. Lieberman because of ''typical inhalants'' in the workplace: ''Ms. Walsh cannot and should not return to her current work place.''. . . Union Switch continues to believe that its reasons as fully detailed in the October 19, 1992 letter from Ray Stetz to Ms. Walsh were ample justification for not permitting Ms. Walsh to work at home.
>
> Ms. Walsh has not been employed by Union Switch since October 19, 1992. Therefore, Union Switch no longer has any obligation to reasonably accommodate her alleged disability.[1] The accommodations suggested by the SOE and discussed at the February 22, 1993 third step meeting therefore represent settlement proposals and nothing more. Union Switch rejects these settlement proposals because it acted properly in separating Ms. Walsh from employment effective October 19, 1992. Moreover, the degree of isolation and alteration required by the SOE's settlement proposals would not constitute a reasonable accommodation in any event.
>
> In accordance with the foregoing, Union Switch denies the October 29, 1992 letter grievance filed on behalf of Jacqueline Walsh.

[1] This of course assumes the existence of a qualified disability which Union Switch does not concede.

H. *Later Events in 1993: the March 23 Request for Arbitration; the April 6 Decertification of the SOE; the April 20 and 27 Requests for the Air Quality Report and Other Information; Respondent's April 27 Rejection of the Requests; the April 30 Expiration of the Bargaining Agreement*

By certified mail letter dated March 23, 1993, the SOE stated that it was ''still of the opinion that Ms. Walsh was improperly separated from her employment by the Company in violation of our labor agreement.'' The letter requested ''binding arbitration per step 4 of Article 1X Part B Grievance/Arbitration Procedure of our current labor agreement'' (see supra, sec. II,B).[7] On March 26, the SOE lost a decertification election. No objections were filed, and on April 6, 1993, the Board issued a certification of election results.

A letter to the Federal Mediation Conciliation Service dated April 8, 1993, under the SOE's printed letterhead and signed ''Thomas C. Clapper, President, S.O.E.,'' with copies to Stetz among others, stated, in part:

> A dispute exists between the Society of Engineers, a labor union, and Union Switch & Signal, Inc. Said parties are submitting the dispute to binding arbitration per applicable sections of the current collective bargaining agreement.
>
> Please find enclosed a copy of pertinent pages of the current collective bargaining agreement (art. IX, sec. B, step 4) concerning the arbitration procedure [supra, Section II,B]. The procedures includes [sic] procuring a list of five arbitrators from your agency.
>
> The dispute involves an employee dismissal, a ''proper cause'' clause, and the ''Americans with Disabilities Act ['']' which became effective in late July of 1992. . . .
>
> Please inform me as to when I can expect to receive the list of arbitrators.

A hand-delivered letter to Stetz dated April 20, 1993, under the SOE's printed letterhead, and signed ''Thomas C. Clapper/President, S.O.E.,'' stated, in part:

> In order to properly represent Ms. Walsh at the upcoming arbitration proceeding, the [SOE] is requesting the following information.
>
> 1. A copy of the report of the air quality study done last fall at the 5800 Corporate Drive facility. The [SOE] needs a copy for review by the [SOE's] legal counsel and for review by Ms. Walsh's physician. Your restriction of only allowing [SOE] officers to read the report and take some notes is inadequate for this purpose.
>
> Note: A copy of this report has been requested twice before by the [SOE][8] and once by Ms. Walsh.
>
> 2. Copies of all documentation which evaluated the accommodations as requested by Ms. Walsh or the alternative accommodations presented during the 2/22/93 grievance meeting, including but not limited to cost estimates, equipment purchases, manpower impacts, building modifications, changes in job assignments, and work schedule modifications.
>
> Receipt of this information is requested by the end of the working day on Monday, 4/26/93. . . .
>
> I will at [sic] the Company's Batesburg, S.C., facility on April 21st through 23rd. If you have any questions you may ''page'' me there.

A hand-delivered letter to Stetz dated April 27, 1993, under the SOE's printed letterhead and signed ''Thomas C. Clapper/President, S.O.E.'' again requested the information specified in Clapper's April 20 letter, and again stated:

> The [SOE] needs a copy [of the air quality study] for review by the [SOE's] legal counsel and for review by Ms. Walsh's physician. Your restriction of only allowing [SOE] officers to read the report and take some notes is inadequate for this purpose.

By letter to Clapper dated April 27, 1993, Company Attorney Prorok stated that Respondent had referred Clapper's March 23, and April 8, and 20, 1993 correspondence to

[7] The bargaining agreement states that a request for arbitration ''must be made within ten (10) working days after final answer under the 3rd step.'' This answer was dated March 10. The record, however, fails to show when the SOE received it, when Respondent received the SOE's letter requesting arbitration, or the number of working days during any allegedly relevant period. Clapper credibly testified without contradiction on Nov. 10, 1993, that Respondent had never said that the SOE's request for arbitration was submitted in an untimely manner. Nor has Respondent raised such a contention before me.

[8] Clapper testified that he was there referring to his letters of October 23 and 27, 1992 (see supra, sec. II,E,F).

March 23 and April 8 and 20, 1993 him for reply. Prorok's letter went on to say that Respondent would not participate in the selection of an arbitrator, would not arbitrate the Walsh ''matter,'' and would not produce the information requested in Clapper's April 20 letter to Stetz. After setting forth the SOE's decertification, the letter stated:

> The SOE is no longer a labor union representing Jacqueline Walsh or any other Company employee. Therefore the SOE is not privileged to arbitrate the Walsh matter, nor may it compel the Company to produce information under the National Labor Relations Act. These are prerogatives reserved for a collective bargaining representative.

The bargaining agreement between Respondent and the SOE expired by its terms on April 30, 1993, 3 days after the date on this letter. No grievances were filed after March 26, 1993, the date of the decertification election. As of that date, no grievances except the Walsh grievance were pending at any stage of the arbitration procedure, and (with the exception noted in the margin) no grievances were pending at any stage of the grievance procedure.[9] As of the date of the hearing before me (November 10, 1993), Respondent had never supplied the SOE with the information which Clapper requested in his letters to Stetz dated April 20 and 27, 1993.

Clapper testified at the hearing before me that the SOE intended to argue, before any arbitrator who might hear the Walsh grievance, that she should be reinstated with full backpay; ''We hope for that.''

A letter dated November 2, 1993, from Kolkman to the director of the Office of Federal Contract Compliance ''in regard to the *Notification of Results of Investigation* concerning Ms. Walsh's complaint . . . and in particular with respect to the indoor Air Quality study performed at 5300 Corporate Drive [sic],'' states that in Kolkman's ''opinion'' the study was ''flawed.'' The letter asserted that the walls and ceilings near the duct openings had been ''extensively cleaned'' of ''mold and other foreign matter'' a week before the test commenced;[10] on the fact (which he had learned from the report) that the test had been performed on a Monday, after ''The building had the weekend to dissipate its built-up pollutants of the previous week,'' and on the identity of the test areas (which he had learned from the report), described in the letter as ''the least populated areas in the building'' (the test areas did not include Walsh's work area). Kolkman's letter further stated, ''Copies of the actual test data were not available. The test data could be reviewed only in the office of the Manager of Human Resources''; Kolkman credibly testified that he included this statement in the letter because ''I called Mr. Stetz and asked him if we could get a copy of it. It was not available''; and that Kolkman wanted a copy because ''Basically, I wanted to see what the data were.'' The letter concluded with the language, ''I believe the test . . . was flawed and as a result denies Ms. Walsh a fair objective assessment of the air quality in the building where Ms. Walsh had her office.''

I. *Analysis and Conclusions*

1. Whether Respondent violated Section 8(a)(5) and (1) by failing and refusing since about November 2, 1992, to furnish the SOE with a copy of the indoor air quality study

a. *Whether this allegation is time-barred*

Paragraph 10 of the complaint in its final form alleges that Respondent violated Section 8(a)(5) and (1) ''since about November 2, 1992,'' by failing and refusing to furnish the SOE with a copy of the indoor air quality study. Respondent contends that this allegation is time-barred by Section 10(b) of the Act, on the ground that the SOE's initial request for this document was made on October 23, 1992, more than 6 months before the charge was filed on April 30, 1993, and served on May 3, 1993. Respondent errs in tacitly assuming the October 23 date of the SOE's request to be the critical date; rather, the critical date is the date of Respondent's allegedly unlawful failure or refusal to supply the document. *New Jersey Bell Telephone Co*., 289 NLRB 318 fn. 2 (1988); *Christopher Street Owners Corp*., 286 NLRB 253 (1987), modified 136 LRRM 2648 (D.C. Cir. 1991). Nevertheless, because the SOE's October 23 letter requested the document on or before October 28, I assume, without deciding, that October 28 was the critical date to the extent that the General Counsel relies on Respondent's conduct in connection with the October 23 letter, to which Respondent never replied (see *J. P. Sturrus Corp*., 288 NLRB 668 (1988)), and that because October 28 fell outside the 10(b) period, the complaint would be time-barred with respect to such conduct.[11]

On October 29, 1992, however, the SOE again requested the document, this time by November 4, 1992. Because this November 4 date fell within the 10(b) period, the complaint is not time-barred with respect to Respondent's conduct in connection with this request (*Sturrus*, supra,) or the SOE's requests for the same document by Clapper's letter to Stetz

[9] Clapper testified that at the time of decertification, ''if you want to really get technical about it, if you go back to a number of years, there's one grievance that just sort of died. It was never fully processed. It got hung up because the company refused to provide information on it. . . . Probably [it] wasn't addressed for well over a year. It's essentially an extension of the same situation.'' The grievance had been filed by Walsh regarding a disciplinary warning about her job performance. Stetz testified that Respondent did not in any fashion refuse to process that grievance, and that the SOE had never asked for the appointment of an arbitrator to hear it.

[10] The notes by Clapper in the text to which fn. 17 (infra) is attached were made in connection with the following material which he at least attempted to copy verbatim from the study: ''No microbial growth or molds observed on the surfaces of the air handling units, ceiling grills or diffusers.'' Although Kolkman, too, reviewed the study in November 1992, he testified in November 1993 that as to the cleaning, his assertions in the November 1993 letter had been based on his personal observations in the rest area where he and other employees had coffee, and not on something that he gained from reading the study.

[11] Logically followed, however, this approach might lead to some rather peculiar results. For example, if Respondent was under a statutory duty to supply the document (on request) within a reasonable time, and the SOE's initial request for the document had been its Oct. 29 request to receive the document by Nov. 4, the approach in the text suggests the conclusion that if Respondent had first supplied the document on Nov. 5—a week after it was requested—Respondent would have violated the Act by failing to supply it within a reasonable time—that is, by undue delay in supplying it.

dated November 2, 1992, Clapper's oral request to Stetz a few days later, and Clapper's letters to Stetz dated April 20 and 27, 1993.[12] Respondent's failure to respond to the Union's initial request therefor on October 23, 1992, does not render time-barred the complaint allegations with respect to Respondent's failure and refusal within the 10(b) period to supply the document pursuant to requests therefor after October 23, 1992. *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 637–638 (2d Cir. 1982); *Resthaven Nursing Home*, 293 NLRB 617, 618 (1989). I find no merit to Respondent's contention that the November 2 letter imposed no duty on Respondent because it ''is not an information request [but] a letter merely reminding [Respondent] of the pendency of the October 29 requests'' (Br. 5). See *Accurate Die & Mfg. Corp*., 242 NLRB 280, 283, 285 (1979). In any event, the quoted language concedes the sufficiency of the ''October 29 requests'' that Respondent provide a copy of the study by a date within the 10(b) period. Nor does Respondent question the sufficiency of the requests made after November 2, 1992.

b. *Whether Respondent's conduct in connection with the 1992 requests after October 23 violated Section 8(a)(5) and (1)*

Section 8(a)(5) and (1) of the Act imposes on an employer the duty to furnish, to its employees' statutory representative, relevant information which is needed by the representative in carrying out its statutory duties and responsibilities, including its responsibilities in connection with unit employees' grievances. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–439 (1967); *NLRB v. Pfizer, Inc*., 763 F.2d 887, 889–890 (7th Cir. 1985); *NLRB v. Illinois-American Water Co*., 933 F.2d 1369, 1377–1378 (7th Cir. 1991); *Consolidation Coal Co*., 307 NLRB 69, 72 (1992). As Respondent does not appear to question, the air quality study constitutes relevant information which was needed by the SOE in processing the Walsh grievance based upon her separation for alleged inability to work allegedly because of respiratory problems for which Respondent was unable or unwilling to make accommodations in connection with air quality. Moreover, as Respondent does not appear to dispute, the air quality study would have been relevant information needed by the SOE in exercising its statutory right to try to protect employees from exposure to unhealthful air at their workplace.[13] Respondent contends, however, that it discharged its statutory duty to supply information when, in response to the SOE's repeated requests for a copy of this document, Respondent made it available to SOE representatives for inspection and notetaking. I disagree.

Although an employer is not obligated to furnish information in the exact form requested by the employees' representative, the employer is obligated to make that information available in a manner which is consistent with such considerations as the complexity, volume, and nature of the information involved; the importance to the bargaining representative vel non of accurate and complete information; the comparative costs to both the employer and the bargaining representative of photocopying as compared to the procedures of reading, notetaking, and hand-copying; whether grievance meetings would be shortened and the grievance process expedited and otherwise facilitated by photocopying rather than by using the procedure of reading, notetaking, and hand-copying; and the ability of the bargaining representative's handcopyist to decide which portions of the document should be copied because they were relevant or helpful to understanding the relative merits of the parties' positions.[14]

In the instant case, every one of these considerations supports the General Counsel's contention that the statute requires Respondent to furnish the SOE with a copy of the air quality study, and that Respondent did not discharge its statutory obligations by giving two SOE officers—both of them unit employees—the opportunity to read it and take notes. The air quality study included 12 pages of tabulations, which would not only be laborious to copy by hand but also be difficult to copy by hand with absolute accuracy. Moreover, although Clapper and Kolkman have bachelor's degrees in physics and electrical engineering, respectively, neither of them is an expert in air quality;[15] and the lack of any substantial resemblance between their respective notes of the air quality study suggests in itself that at least one of these employees, and perhaps both, are not wholly capable of ascertaining which portion of the study would be helpful to the persons whom the SOE consulted, or planned to consult, to assist it in handling the Walsh grievance or assessing what (if anything) should be done in connection with the air quality in the Corporate Drive building. Thus, Kolkman testified that when he copied down from the report the chemical abbreviations for various pollutants he did not know what these abbreviations stood for;[16] and, when I pointed out to him an entry in his notes which I read as referring to the ''majoa effect'' and asked whether he remembered what it was, he credibly replied, ''No, I don't. Sorry. I'm sure a quality engineer can, quality air.'' Similarly, when Clapper was asked about an entry in his notes stating, ''OSHA PEL 35 ppm,''

[12] Respondent appears to contend that because the SOE's charge alleges a refusal to bargain ''Since, on, or about 11/02/92,'' Sec. 10(b) precludes the General Counsel from relying on the Oct. 29, 1992 request that Respondent provide a copy of the study by Nov. 4, 1992. I find the variance as to dates insufficient to call for such a conclusion. *Bentson Contracting Co*., 298 NLRB 199 fn. 4 (1990).

[13] See generally, *Oil Workers Local 6-418 (Minnesota Mining) v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). I note that the 1991–1993 agreement called for restriction of smoking to ''certain independently ventilated areas'' in the ''North Hill Facility'' (supra, part II, B).

[14] *American Telephone Co*., 250 NLRB 47, 54 (1980), enfd. 644 F.2d 923 (1st Cir. 1981); *Laidlaw Waste Systems*, 307 NLRB 1211, 1214 (1992); *New Jersey Bell*, supra at 331–332; *NLRB v. Electrical Workers Local 497 (Apple City Electric)*, 795 F.2d 836, 839 (9th Cir. 1986).

[15] Clapper is classified as an ''Engineer A,'' and his job responsibilities have consisted of designing magnetic base products. Kolkman is classified as a ''Senior Engineer'' who designs electronic circuitry in railroad signalling equipment.

[16] He testified that he never found out the meaning of the chemical abbreviations he was asked about on direct examination by Respondent, because ''they retained that this level were [sic] okay on those parts.'' Although all of these abbreviations in his Nov. 19, 1992, notes were explained in the letter from Volz which Respondent posted on Oct. 20, 1992, the record fails to show how long this letter was posted and, moreover, Kolkman testified in Nov. 1993. I suspect however, that to some extent he testimonially overstated his ignorance as to these abbreviations.

he credibly testified, ''I don't know what the PEL represents. I am familiar with OSHA, it is a Federal agency; 35 would be a concentration of something.'' Also, after a portion of his notes regarding the Volz recommendations, he wrote ''(Note: Can't be sure what all is covered by this statement)''; when asked about this entry, he testified, ''Essentially, I don't know to what depth of analysis you know, what they looked for, how they looked for it. It was just a general conclusion made by the consultant without really explaining how it was done.''[17] In addition, Clapper credibly testified that he was not at all familiar with the meters whose names he (but not Kolkman) copied from the report, which stated that these were the equipment used to take the measurements. Clapper's October 23, 1992 estimate that to ''review'' the report would take ''several hours . . . extended hours'' (the former estimate being relied on in Respondent's brief) was advanced before any SOE representative had seen the report, and suggested only a preliminary judgment—which the SOE did not adhere to after seeing the report and processing the grievance—that a mere ''review'' would be sufficient. Further, the expense of photocopying a document consisting of about 12 pages of tables plus several summarizing pages would not appear to be prohibitive; and notwithstanding Clapper's request in his October 23, 1992 letter that Stetz advise him of any ''additional requirements . . . which may be necessary to obtain a copy,'' Respondent never offered to provide a photocopy if the SOE would pay for the expense of the photocopy. Indeed, so far as the record shows, Respondent's representatives have never given the SOE any reason whatever for denying the SOE a copy and requiring SOE's employee officers to use a ''quill and scroll ritual'' (*Communication Workers Local 1051 (American Telephone Co.) v. NLRB*, 644 F.2d 923, 924 (1st Cir. 1981)).

I regard as unwarranted Respondent's proposed inference that satisfaction by the SOE with its note-taking/hand-copy opportunity is shown by SOE's failure to ask for a complete copy between about November 9, 1992 (before Clapper's and Kolkman's inspections of the study on November 16 and 19, respectively) and April 20, 1993 (12 days after the SOE requested arbitration). Clapper's testimony shows that Respondent's inspection offer was accepted by him reluctantly, and because Respondent had refused to give him a copy.[18] Because the SOE had fruitlessly requested a copy on four different occasions between October 23 and about November 9, and Respondent had repeatedly refused such requests, the most that can be inferred is that the SOE believed the advantages of obtaining without the study a speedy resolution of a perceivedly meritorious grievance outweighed the advantages of obtaining a document which might or might not improve the SOE's chances of a favorable third-step resolution but would almost certainly entail delay in whatever third-step disposition was reached as to Walsh's separation. See *Minnesota Mining & Mfg. Co*., supra at 357. After Respondent rejected the grievance at the third step and arbitration was the SOE's only further recourse, the SOE decided that the advantages of obtaining the study outweighed the advantages of obtaining a prompt arbitral disposition of the grievance; accordingly, the SOE requested the study again and filed charges with the NLRB when the study still was not forthcoming.

The cases relied on by Respondent do not suggest that its willingness to permit inspection, notetaking, and copying of the instant air quality study was sufficient to comply with Respondent's statutory duty in connection with that study, which included 12 pages of tabulations as well as other material. In *Roadway Express*, 275 NLRB 1107 (1985), the document consisted of a single, one-page letter from a customer; in *Abercrombie & Fitch Co.*, 206 NLRB 464 (1973), the documents consisted of a half-page confession of theft from a cash register and an ''uncomplicated cash register record consisting of three one-page documents and a series of sales slips.''

For the foregoing reasons, I find that Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide a copy of the air quality study upon the SOE's requests on October 29 and November 2, 1992.[19]

2. Whether Respondent violated Section 8(a)(5) and (1) by its conduct in connection with the SOE's effort to submit the Walsh grievance to arbitration

An employer violates Section 8(a)(5) and (1) of the Act by repudiating a contractual obligation to arbitrate. *Indiana & Michigan Electric Co*., 284 NLRB 53, 59 (1987). Such a violation is made out where an employer engages in a wholesale refusal to apply the contractual arbitration provision to grievances which arose under the contract, on the ground that the contract has expired. *Indiana & Michigan*, supra at 59–60. Contrary to Respondent, I conclude that Respondent's conduct constituted a ''wholesale repudiation of its contractual obligation to arbitrate'' within the meaning of *Indiana & Michigan*. It is true that the Walsh grievance was the only grievance which Respondent refused to arbitrate. However, the Walsh grievance was also the only pending grievance as to which the prearbitration grievance procedure had been exhausted before the contract expired; and, in advising the SOE that Respondent would not arbitrate the Walsh grievance, Respondent advanced as its sole reason the claim that the SOE was ''no longer a labor union representing Jacqueline Walsh or any other Company employee'' and that the ''privilege []'' to arbitrate the matter ''is a ''prerogative [] reserved for a collective bargaining representative.'' Such a statement indicated ''a blanket refusal to arbitrate any grievance of any kind'' (*A. H. Belo Corp*., 285 NLRB 807 (1987)).[20] Moreover, Respondent erred in contending that the decertification deprived the SOE of any right which it otherwise would have had to require the arbitration of grievances which arose during the effective period of the bargaining agreement. *Govern-*

[17] See fn. 10, supra.

[18] ''[F]ull knowing . . . that I could not get a copy of [the air quality study], I did arrange [with Stetz] to go in and look at the report on November 16th, 1992.''

[19] Whether Respondent violated the Act in connection with the SOE's 1993 requests is discussed infra, sec. II, I,3.

[20] Cf. *Xidex Corp. v. NLRB*, 924 F.2d 245, 255 (D.C. Cir. 1991), relied on by Respondent, where the court stated,

> The employer's position did not amount to a repudiation of the union contract. Instead, the delay [in submitting to arbitration] resulted from [the employer's] position that, under the collective bargaining agreement, it had no duty to arbitrate the particular grievances in question.''

ment Employees Local 888 (Bayley-Seton), 308 NLRB 646, 649–650 (1992).[21]

Respondent appears to contend that its repudiation of the contractual arbitration provisions did not violate Section 8(a)(5) and (1), on the ground that by the time this repudiation occurred, the SOE was no longer a labor organization within the meaning of Section 2(5) of the Act. As to this contention, the record shows that the SOE was the NLRB-certified representative of a unit of Respondent's employees between at least 1947 and April 6, 1993. During most of this period, it was a party to collective-bargaining agreements with Respondent, the most recent of which expired on April 30, 1993, and included a recognition clause and provisions with respect to wages, vacations, holidays, grievances, pensions, insurance, jury and funeral pay, discharge or suspension, severance pay, checkoff, and SOE membership as a condition of continued employment. On April 30, 1993, Weiers signed the charge in the instant case, in his capacity as counsel for the SOE. At least as late as April 27, 1993, Clapper was sending out letters signed ''President, S.O.E.'' under the letterhead which he had been using at least as early as October 29, 1992—namely, ''Society of Engineers/Representing the Engineering Personnel of Union Switch & Signal/5800 Corporate Drive-Pittsburgh, Pennsylvania.'' On November 10, 1993, employee Clapper credibly testified to the following effect: SOE is a membership organization whose members include employees of Respondent. SOE's officers are selected by election. Clapper is the president of the SOE, and has occupied that position for 5 years. The SOE conducts a general membership meeting annually, and conducted such a meeting in July or early August 1993, where topics other than Walsh's situation were discussed. In addition, about every 2 months, a ''board of representatives'' meets; such a meeting was held by Clapper on November 9, 1993, regarding the unfair labor practice hearing and the status of Walsh's grievance. Employees pay dues into the SOE treasury; they are deposited in a current SOE account into which both predecertification and postdecertification dues were deposited. The last ''major'' dues payment was made in March 1993, the last month during which Respondent honored the employees' checkoff authorizations. Clapper himself however, paid dues in early November 1993, and employee Kolkman paid dues in June 1993, although he might be due a refund because dues had been ''recently suspended'' with a view to lowering them in view of the reduced activity by the SOE which was anticipated as a consequence of the decertification on April 6, 1993.

Section 2(5) of the Act defines a ''labor organization'' as

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

I conclude that as of the close of the hearing on November 10, 1993, the SOE was, and at all material times had been, a labor organization within the meaning of Section 2(5). Indeed, Respondent does not appear to question that the SOE enjoyed that status between its certifications (no later than 1947) and the decertification election on March 26, 1993, and that until that date the SOE was an organization in which Respondent's employees participated and which existed at least partly for the purpose of dealing with Respondent as an employer concerning the subjects specified in Section 2(5). Moreover, after the decertification election and certification of results, employees of Respondent continued to participate in the SOE, including paying dues into a treasury which was kept in a bank account under SOE's name, and attending membership and board meetings. Furthermore, after the April 1993 decertification, counsel retained by the SOE filed on its behalf a charge which alleged that Respondent had refused to bargain with the SOE since November 1992. Also, after the decertification, the SOE continued to use a letterhead which described it as representing Respondent's engineering personnel, and continued its attempts to prosecute the Walsh grievance. The absence of evidence that after the decertification the SOE otherwise actively represented any employees in dealing with management is attributable to the fact that it is still an unaffiliated organization with membership consisting at least mostly (and probably entirely) of Respondent's employees, has held itself out in its letterhead as representing Respondent's personnel (with no reference to any other employer),[22] and after decertification had no power to compel Respondent to deal with it for most purposes. I perceive no basis for inferring that the decertification changed the SOE's 46-year purpose for existing, as distinguished from its power to effectuate that purpose in the immediate future. Although the decertification may have rendered the SOE an ineffectual representative, which for most purposes cannot now require Respondent to deal with it, this circumstances does not deprive the SOE of its status as a labor organization. See *Alto Plastics*, 136 NLRB 850, 851–852 (1962); *Kodiak Island Hospital*, 244 NLRB 929 (1979).

Accordingly, I find that Respondent's refusal to arbitrate the Walsh grievance, on the ground that the SOE had been decertified, amounted to a repudiation of the contractual arbitration provisions with respect to predecertification grievances which arose during the term of the contract and, therefore, violated Section 8(a)(5) and (1) of the Act. I need not and do not consider whether loss of such status before the SOE requested arbitration would have excused Respondent's repudiation of the arbitration provisions, or whether loss of such status thereafter would have affected the remedy for such unlawful repudiation.

[21] *Bayley-Seton* cannot be distinguished, as Respondent seeks to do, on the ground that it alleged 8(b)(1)(A) violations by a union for arbitrarily refusing to process the grievances of three employees (the charging parties) who had been included in the bargaining unit represented by the union before its decertification. In sustaining the complaint, the Board found the refusal to be arbitrary because grounded on the decertification, which was found to be an arbitrary reason on the basis of cases which held an employer was obligated by Sec. 8(a)(5) of the Act, as well as by contract, to arbitrate predecertification grievances which arose during the term of a contract.

[22] The SOE's mailing address, which is included in its letterhead, is 5800 Corporate Drive, an office building which (according to Stetz) is leased in its entirety by Respondent.

3. Whether Respondent violated Section 8(a)(5) and (1) by failing and refusing to honor the SOE's April 20 and 27, 1993 requests for information

The SOE's letters to Respondent dated April 20 and 27, 1993, fruitlessly requested (a) copies of ''all documentation which evaluated the accommodations as requested by Ms. Walsh and the alternative accommodations presented during the 2/22/93 grievance meeting''; and (b) a copy of the air quality study. Respondent defends the refusal to supply this information on the ground—as to item (a), on the sole ground—that Respondent was under no duty to honor the contractual arbitration provisions with respect to a predecertification grievance, for use in whose arbitration the SOE gave as its reason for seeking this material. I have found (supra sec. II, I,2) that Respondent was under a statutory duty to honor the arbitration provisions with respect to such grievances. For this reason, and because in any event Respondent was under a contractual duty to arbitrate the Walsh grievance (see *Bayley-Seton*, supra, 308 NLRB at 649), I conclude that Respondent violated Section 8(a)(5) and (1) by refusing to honor as to both items the SOE's April 1983 requests. *Jervis B. Webb Co*., 302 NLRB 316, 318 (1991), enfd. 979 F.2d 855 (9th Cir. 1992). Because the duty to supply information relevant to a grievance is imposed in effectuation of the duty to bargain about a grievance, such duties are coterminous. Thus, in order to insure that the employer could not commit contractual violations with impunity during the closing days of the contract's term, the Board in *Jervis B. Webb* stated, ''as the information requested by [the union] here is necessary for it to process its preexpiration grievance, [the employer's] obligation to furnish the requested information continued even after the contract had allegedly expired.'' 302 NLRB at 318.

In my view, this quoted language in *Webb* defeats Respondent's reliance on the fact that the requests for information in *Webb* were made and received before the expiration date set forth in the bargaining agreement under which the grievance arose. Rather, I read *Webb* as extending to any request for information, relevant to a preexpiration grievance, which the employer would have been under a statutory duty to honor before the contract expired; see *Oliver Insulating Co*., 309 NLRB 725, 726 (1992). For this reason, I agree with Respondent's implicit contention that it is immaterial that the SOE's April 1993 information requests were made and received (like the *Webb* request) before the expiration date set forth in the bargaining agreement during which the preexpiration grievance arose. In any event, the April 30, 1993 expiration date of the instant bargaining agreement, which was effective on its face for a period of 2 years, was not altered by the March 26 decertification election or the April 6 certification of results. *W. A. Krueger Co*., 299 NLRB 914, 914–915, 918, 923 (1990).[23] Indeed, Respondent's answer admits the complaint allegation that the contract was effective until April 30, 1993.[24]

[23] This decision was unanimous with respect to the holding for which it is cited here. See the concurring/dissenting opinion of then Board Member Clifford R. Oviatt Jr., 299 NLRB at 919.

[24] Unlike the case at bar, *Retail Clerks International Assn. v. Montgomery Ward & Co*., 316 F.2d 754 (7th Cir. 1963), relied on in Respondent's posthearing brief, involved a decertification which issued pursuant to a decertification petition which was timely with respect to a current, 5-year contract because that contract exceeded the maximum duration (then, 2 years; under present Board practice, 3 years) during which the Board would treat the contract as a bar to all representation petitions except a petition filed by a noncertified contracting union. See *Montgomery Ward*, supra at 757; *General Cable Corp*., 139 NLRB 1123 (1962). In cases like *Montgomery Ward*, to regard the contract as in effect after the contracting union's decertification (there, about 3 years before the contract was to expire by its terms) would undermine a principal purpose of *General Cable*—that is, to preclude undue restriction of the employees' rights to freedom of choice of representatives. In the case at bar, because the bargaining agreement had only a 2-year duration and expired by its terms less than a month after the SOE's decertification, giving it effect for its full term would contribute to the reasonable stability whose preservation is another principal purpose of *General Cable*.

Sheet Metal Workers Local 162 v. Jason Mfg., 900 F.2d 1392 (9th Cir. 1990), also cited by Respondent, involved a representation petition filed by an employer after the June 30, 1983 expiration of an earlier bargaining agreement and before the Feb. 1984 issuance of an interest-arbitration award which purported to determine the terms and effective period of a contract to become effective retroactive to July 1, 1983, and whose expiration date was agreed to be June 30, 1986. Under such circumstances, the court's conclusion that as to the period after being decertified in Feb. 1986, the union had no ''rights under the contract'' is consonant with the results reached by the Board with respect to contracts agreed to after a petition has been filed—results which accommodate the respective interests of stability in bargaining relationships once established, employee freedom of choice, and predictability of a period when an ouster of or a change in the identity of the current statutory representative may be sought. See *RCA Del Caribe, Inc*., 262 NLRB 963, 964–966 (1982); *Embree Buses, Inc*., 226 NLRB 714 fn. 6 (1976); *W. A. Krueger*, supra, 299 NLRB at 915–918 (1990) (then Member Oviatt dissenting); *Brown Transport Corp*., 296 NLRB 1213 (then Chairman James M. Stephens dissenting on grounds irrelevant here).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. SOE has at all relevant times been a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All Engineering Associates, Technicians A, Technicians B, Technicians C, Senior Engineers, Engineers, Engineers A, Engineers B, Quality Assurance Engineers Junior, Quality Assurance Engineers Associate, Quality Assurance Engineers, Materials Engineers, Materials Engineers Associate, Component Test Engineers, RMR Analysts and RMR Specialists employed by Respondent at its Pittsburgh, Pennsylvania, facility; excluding guards, other professional employees and supervisors as defined in the Act.

4. Pursuant to Section 9(a) of the Act:

(a) At all material times until April 6, 1993, the SOE has been the exclusive bargaining representative of the unit described in Conclusion of Law 3.

(b) At all material times until April 30, 1993, the SOE has been the exclusive bargaining representative of the unit described in Conclusion of Law 3 for the purposes of administering the current collective-bargaining agreement.

(c) At all material times, the SOE has been the exclusive bargaining representative of the unit described in Conclusion of Law 3 for the purpose of processing, under the grievance and arbitration provisions of the collective-bargaining agreement which expired on April 30, 1993, grievances which arose during the term of that agreement.

5. Respondent has violated Section 8(a)(5) and (1) of the Act by engaging in the following conduct:

(a) Since about November 4, 1992, failing and refusing to provide the SOE with a copy of the air quality study.

(b) Since about April 27, 1993, failing and refusing to provide the SOE with copies of all documentation which evaluated the accommodations as requested by Jacqueline Walsh and the alternative accommodations presented during the grievance meeting on February 22, 1993, including but not limited to cost estimates, equipment purchases, manpower impacts, building modifications, changes in job assignments, and work schedule modifications.

(c) Since about April 27, 1993, refusing to arbitrate a grievance filed on behalf of Jacqueline Walsh, in a manner and under circumstances which render such refusal a repudiation of the arbitration provisions of the May 1991–April 30, 1993 bargaining agreement with respect to grievances which arose during the life of that agreement.

6. The unfair labor practices set forth in Conclusion of Law 5 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action which is necessary to effectuate the policies of the Act. Thus, Respondent will be required to honor the SOE's request for arbitration of the Walsh grievance, and to provide the SOE with the information which Respondent unlawfully withheld in connection with that grievance. Respondent errs in contending that the Board has no power to issue such an affirmative order because Respondent has raised the contention that the Walsh grievance is not arbitrable under the terms of the contract[25] and (according to Respondent) the Board has no power to resolve this issue. Contrary to Respondent, the Board ''may . . . if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining contract. *NLRB v. C & C Plywood Corp*., 385 U.S. 421 (1967).'' *NLRB v. Strong*, 393 U.S. 357, 361 (1969). See also *Litton Business Systems v. NLRB*, 501 U.S. 190, 201–203 (1991); *Clarkson Industries*, 312 NLRB 349, 350 (1993).

Moreover, I agree with the General Counsel that the grievance is arbitrable under the 1991–1993 bargaining agreement. ''[A]n order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'' *AT & T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986); *Clarkson*, supra.[26] It is true that the arbitrator's jurisdiction is contractually limited to ''an alleged violation of a provision of this Agreement,'' and that the grievance relies on article X of the contract, which forbade Respondent to ''discharge or suspend any employee without proper cause.'' I find however, Walsh's grievance to be arbitrable because it complains of action which constitutes a discharge within the meaning of the contract. Thus, Respondent's October 19, 1992 letter to Walsh averred that Respondent was treating her ''alleged inability to work at the Corporate Drive offices as a separation from employment effective October 19, 1992.'' Moreover, company counsel's March 10, 1993 letter to the SOE averred that Walsh ''has not been employed by Union Switch since October 19, 1992 . . . Union Switch . . . acted properly in separating Ms. Walsh from employment effective October 19, 1992.'' Indeed, a finding that Walsh's October 1992 separation did not constitute a discharge within the meaning of the contract would indicate that she continued to accumulate seniority until the contract expired in April 1993.[27]

The Walsh grievance is not rendered nonarbitrable by the expiration of the contract on April 30, 1993. Assuming with Respondent that the arbitrator's power to remedy Walsh's discharge would be limited to awarding her backpay between her discharge on October 19, 1992, and the expiration of the contract on April 30, 1993,[28] the arbitrator might nonetheless have power to award Walsh backpay for this 6-month period. See *Overly*, supra, 438 F.S. at 927; *Miscellaneous Drivers & Helpers Local 610 v. VDA Moving & Storage*, 447 F.S. 439, 442–443 (E.D. Mo. 1978); *Marval Poultry*, supra, 645 F.S. at 1177–1180.

In addition, Respondent will be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Respondent, Union Switch & Signal, Inc., Columbia, South Carolina, its officers, agents, successors, and assigns, shall

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[25] So far as the record shows, Respondent did not raise this contention until the hearing before me.

[26] Cf. *Litton*, supra at 209–210, involving grievances as to layoffs which took place after the bargaining agreement had expired. As to these grievances, *Litton* suggested that the presumption of arbitrability was somewhat weaker than as to grievances which (like the Walsh grievance) attacked personnel action during the effective period of the contract. As to the critical date in determining whether to apply the *AT & T* presumption or the *Litton* presumption, I read *Litton* as adopting the date on which the attacked personnel action occurred. Moreover, Respondent's refusal to arbitrate the Walsh grievance was set forth in its letter to the SOE dated April 27, 1993, 3 days before the contract expired (see supra, sec. II, I,2). In any event, my conclusion as to the arbitrability of that grievance would be the same under either standard.

[27] See arts. VII, B and XIII, supra, sec. II, B.

[28] Respondent relies on *United Steelworkers of America v. Overly Mfg. Co*., 438 F.S. 922 (W.D. Pa. 1977). Cf. *Commercial Workers Local 400 v. Marval Poultry Co*., 645 F.S. 1174, 1176–1180 (W. Va. 1986), affd. 819 F.2d 1138 (4th Cir. 1987). Although *Marval* was affirmed by the court of appeals without opinion, see *Commercial Workers Local 400 v. Marval Poultry Co*., 876 F.2d 346, 348–349 (4th Cir. 1989).

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing and refusing to provide its employees' exclusive statutory bargaining representative, on request, with information which is necessary for and relevant to the representative's performance of its duties as such representative.

(b) Repudiating as to grievances which arose between May 1, 1991, and April 30, 1993, the arbitration procedure set forth in the collective-bargaining agreement in effect during that period between Respondent and the Society of Engineers.

(c) Failing and refusing, on request, to provide the SOE with information which is necessary for and relevant to arbitrating such grievances.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Arbitrate pursuant to the procedure set forth in the aforesaid collective-bargaining agreement the grievance filed on behalf of Jacqueline Walsh on October 29, 1992.

(b) Provide the SOE forthwith with the following information:

(1) A copy of the report of the air quality study done in September 1992 at the 5800 Corporate Drive facility.

(2) Copies of all documentation which evaluated the accommodations as requested by Jacqueline Walsh or the alternative accommodations presented during the grievance meeting on February 22, 1993, including but not limited to cost estimates, equipment purchases, manpower impacts, building modifications, changes in job assignments, and work schedule modifications.

(c) Post at its facilities where employees in the job classifications covered by the 1991–1993 bargaining agreement between Respondent and the SOE are employed copies of the attached notice marked ''Appendix.''[30] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to such employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to provide our employees' exclusive statutory representative, on request, with information which is necessary for and relevant to the representative's performance of its duties as such representative.

WE WILL NOT repudiate as to grievances which arose between May 1, 1991, and April 30, 1993, the arbitration procedure set forth in our collective-bargaining agreement with the Society of Engineers in effect during that period.

WE WILL NOT fail or refuse, on request, to provide the SOE with relevant information which is necessary for and relevant to arbitrating such grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL arbitrate pursuant to the procedure set forth in our 1991–1993 bargaining agreement with the SOE the grievance filed on behalf of Jacqueline Walsh on October 29, 1992.

WE WILL forthwith provide the SOE with the following information:

1. A copy of the report of the air quality study done in September 1992 at the 5800 Corporate Drive facility.

2. Copies of all documentation which evaluated the accommodations as requested by Walsh or the alternative accommodations presented during the February 22, 1993 grievance meeting, including but not limited to cost estimates, equipment purchases, manpower impacts, building modifications, changes in job assignments, and work schedule modifications.

UNION SWITCH & SIGNAL, INC.